88-1168
NO. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD C. SWAIN and
EDWARD H. HAMMOND **PETITIONERS**

v.

KENNETH A. LINDSEY **RESPONDENT**

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR PETITIONERS,
DONALD C. SWAIN and
EDWARD H. HAMMOND

January 13, 1989

63pp

QUESTION PRESENTED

1. Whether the Court of Appeals of Kentucky may apply Kentucky law or procedure to deprive a public official sued in state court under 42 U.S.C. § 1983 of his federally recognized right to an immediate appeal of an order denying his entitlement to immunity from trial.

LIST OF PARTIES

The following is a list of all parties, their respective positions in the proceeding before the Court of Appeals of Kentucky, and the parties' respective counsel:

Donald C. Swain and Edward H. Hammond, Appellants

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OPINIONS AND ORDERS BELOW

The unreported orders of the Court of Appeals of Kentucky are attached hereto as Appendix A and B respectively.

JURISDICTION

Petitioners seek review of an Order entered by the Court of Appeals of Kentucky on April 20, 1988. Petitioners filed a timely motion for reconsideration of the order which was denied on August 1, 1988. Petitioners then sought discretionary review of these orders by the Supreme Court of Kentucky; that court declined to review the orders of the Court of Appeals on October 19, 1988. This petition is filed within 90 days of the date of this disposition by the Supreme Court of Kentucky.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

FEDERAL STATUTES INVOLVED

42 U.S.C. § 1983:

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985(3):

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . . in any case of conspiracy set forth

in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. § 1980.)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD C. SWAIN and
EDWARD H. HAMMOND **PETITIONERS**

v.

KENNETH A. LINDSEY **RESPONDENT**

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

Petitioners, Donald C. Swain and Edward H. Hammond, respectfully pray that a writ of certiorari be issued to review the order of the Court of Appeals of Kentucky entered in this proceeding on April 20, 1988, for which rehearing was denied on August 1, 1988 and for which discretionary review was denied by the Supreme Court of Kentucky on October 19, 1988.

STATEMENT OF THE CASE

Respondent, Kenneth A. Lindsey ("Lindsey"), brought this action, which is currently scheduled for trial beginning on February 8, 1989, against Petitioners, Donald C. Swain ("Swain") and Edward H. Hammond ("Hammond"), in their individual capacities, under 42 U.S.C. §§ 1983 and 1985 (hereinafter "federal civil rights statutes"), seeking money damages for actions Swain and Hammond undertook as public officials. Swain was, and is, the President of the University of Louisville, a public institution of higher education operated by the Commonwealth of Kentucky. Hammond was formerly the Vice President for Student Affairs at the University of Louisville. Lindsey, utilizing the concurrent jurisdiction of the Kentucky state courts, filed his action in Jefferson Circuit Court (here-

inafter the "trial court"), a state court of general jurisdiction.

Petitioners raised both sovereign and qualified immunity as defenses to Respondent's claims and moved for summary judgment in the trial court asserting their immunity from having to stand trial and from damages. The trial court denied Petitioners' claims of qualified immunity and, relying upon applicable federal law, certified the order denying Petitioners' claims as final for purposes of appeal.

Petitioners appealed the trial court's order to the Court of Appeals of Kentucky ("Court of Appeals"). Respondent moved to dismiss that appeal as taken from a nonfinal order, contending that the appealability of a denial of qualified immunity must be decided under Kentucky, not federal, rules of law. (See Memorandum Of Authorities In Support Of Appellee's Motion To Dismiss Appeal, attached hereto as

Appendix D). Petitioners opposed this motion, relying upon federal law in general and Mitchell v. Forsyth, 472 U.S. 511 (1985), in particular. (Petitioners' Memorandum In Support Of Response To Motion To Dismiss Appeal is attached hereto as Appendix E). However, the Court of Appeals granted Respondent's motion and dismissed the appeal as "taken from a nonfinal and appealable order."[1/] (Appendix A). Petitioners moved that court for reconsideration, again urging that substantive principles of federal law entitled Petitioners to appellate review of the trial court's

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1/ Kentucky law has recognized the "collateral order doctrine" of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) and Stack v. Boyle, 342 U.S. 1 (1951), upon which this Court based its holding of immediate appealability in Mitchell in criminal cases. See Abraham v. Commonwealth, 565 S.W.2d 152, 155 (Ky. Ct. App. 1977).

order prior to trial. The Court of Appeals denied that motion. (Appendix B).

Petitioners next sought discretionary review of the Court of Appeals' order by asking the Supreme Court of Kentucky ("Supreme Court") to decide

> [w]hether a trial court order denying sovereign and/or qualified immunity to public officials, who have been sued under federal civil rights statutes for actions taken in the course of their employment, and which order is appealable as a matter of right under federal law, will be recognized as an appealable order by Kentucky courts.

Motion For Discretionary Review at p. 6, attached as Appendix F. The Supreme Court declined to grant Petitioners' motion on October 19, 1988. (Appendix C). The Court of Appeals is the highest court in Kentucky which has declined to apply federal law when a public official, sued in state court for money damages in his individual capacity under federal civil rights statutes, seeks to appeal, prior

to trial, a trial court's order denying his claim of qualified immunity.

REASONS FOR GRANTING THE WRIT

A writ should be granted to review the order of the Court of Appeals which dismissed Petitioners' appeal as "taken from a nonfinal and appealable order." The Court of Appeals erred when it refused to recognize Petitioners' right of immediate appeal from the order denying them immunity from trial.

Petitioners' claims of immunity are purely legal issues to be resolved by reference to federal law. Whether qualified immunity is a meaningful protection from the cost of defending insubstantial or groundless litigation certainly should not be made to depend upon whether Plaintiff elects to bring his civil rights action in a state rather than federal forum. While in federal district courts sitting in Kentucky claims of qualified immunity

are recognized as claims of entitlement to "immunity from suit" -- which are "effectively lost if a case is erroneously permitted to go to trial" -- in a Kentucky state court a claim of qualified immunity is now worth substantially less.

The issuance of a writ is particularly appropriate as it will enable this Court to clarify, as a matter of federal law, the nature and scope of the immunity available to public officials. State courts which thus far have considered this issue have reached conflicting and confusing results, causing the contours of the defense of immunity to federal claims to be dependent, not upon federal rules of law, but upon the forum selected. The decision below creates an unfortunate tension between state and federal judicial forums. Individual defendants will inevitably be forced to remove, whenever possible, civil rights actions to federal court so that they

need not withstand trial in order to vindicate their immunity from that very trial. Under the decision of the Court of Appeals, the burden, cost and time involved in defending against a claim of individual liability in a civil rights action will be substantially greater in state court than in federal court.

This Court has carefully delineated the nature of the immunity to which a public official, sued in his individual capacity under federal civil rights statutes, may be entitled. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), an objective standard was adopted entitling public officials to immunity from damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. Whether any particular conduct meets this standard is resolved by reference to federal

law. See, e.g., Martinez v. California, 444 U.S. 277, 284 n.8 (1980). See also Neuborne, Toward Procedural Parity In Constitutional Litigation, 22 Wm. & Mary L. Rev. 725, 781 (1981). In Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), this Court concluded that a trial court's order denying an official's claim to qualified immunity was appealable prior to trial because "[t]he entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." (Emphasis in original).

When the Court of Appeals dismissed Petitioners' appeal from the trial court's order denying Petitioners' claims of immunity, it breached certain well-established rules. A state court hearing a case involving questions of federal law must "proceed in such manner that all

the substantial rights of the parties under controlling federal law would be protected." Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942). Moreover, "the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24 (1923). State rules of decision or procedural rules must be reconciled with, and if necessary, yield to the parties' rights, defenses and immunities under federal law.

The Court of Appeals' refusal to hear Petitioners' appeal unduly impairs Petitioners' rights under federal law. Federal law grants Petitioners both an entitlement to immunity from trial and the immediate right to appeal a trial court's decision denying that immunity. If state courts are permitted to invoke state law or procedure in order to deny

this federal right of immediate appeal, a real and substantial danger is created that the right to such immunity will be rendered "meaningless" in state court proceedings. While it is true that this Court has certiorari jurisdiction over such trial court orders,[2/] neither judicial economy nor principles of federalism favor a system by which this Court must use its resources to police the trial courts of the several states because the appellate courts of those same states have announced legal or procedural rules of law which conflict with established federal rights.

This Court has recognized other situations in which application of state rules and procedures has unduly impaired a litigant's rights under federal law. Thus, in Central Vermont Ry. v. White,

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2/ Mitchell, 472 U.S. at 525 n.8.

238 U.S. 507 (1915), not state law, but the federal rule requiring a defendant to prove the plaintiff's contributory negligence, must be applied when a state court is the forum for a suit under the Federal Employers' Liability Act ("FELA"). A state rule regarding construction and sufficiency of pleadings cannot be applied to dismiss plaintiff's complaint when plaintiff has stated, as a matter of federal law, a claim for recovery under FELA. Brown v. Western Ry., 338 U.S. 294 (1949). More recently, in Felder v. Casey, ___ U.S. ___, 108 S.Ct. 2302 (1988), this Court held that a state "notice of claim" statute could not be applied to bar a suit for damages under 42 U.S.C. § 1983 simply because it had been brought in state court.

State procedural rules may be displaced by federal substantive rights when a federal cause of action is brought in state court.

In Seaboard Air Line Ry v. Horton, 233 U.S. 492 (1914), the Court held that a state trial court erred, in a suit brought under the FELA, by instructing the jury in accordance with state, rather than federal, law. See also Maynard v. Durham & S. Ry., 365 U.S. 160 (1961) (holding that federal law will determine validity of a release in a suit under the FELA brought in state court).

The present case presents an even more urgent reason than many of the foregoing cases for determining that Kentucky law must yield to Petitioners' substantive federal rights to pursue an appeal prior to trial. Generally, where this Court has held that a state procedural rule must yield to a litigant's rights and defenses under federal law, the litigants retained all rights and defenses under federal law. For instance, the plaintiff in Felder can now fully pursue his remedies

under § 1983 in state court; he has been inconvenienced but may ultimately recover as the law provides. Because Petitioners' immunity is from having to stand trial, no court can restore this entitlement once it has been erroneously deprived.

In the brief interim since the Mitchell decision, only four state appellate courts, besides the Court of Appeals of Kentucky, have addressed the question of whether trial court orders denying qualified immunity are appealable prior to trial. The highest courts of Massachusetts, Arkansas and Minnesota have each relied upon state law in finding such orders immediately appealable, and only the Supreme Court of Minnesota found it necessary to consider the question of whether federal law compelled its decision. See Breault v. Chairman of Bd. of Fire Commr's., 513 N.E.2d 1277 (Mass. 1987), cert. denied, ____ U.S. ____, 108 S.Ct. 1078 (1988);

Robinson v. Beaumont, 725 S.W.2d 839 (Ark. 1987); Anderson v. City of Hopkins, 393 N.W.2d 363 (Minn. 1986). The Court of Appeals of Texas, like the Court of Appeals of Kentucky, has found no independent state law supporting an early appeal and rejected the argument that federal law compelled it to hear an appeal prior to trial of an order denying a public official's claim of immunity. Noyola v. Flores, 740 S.W.2d 493 (Tex. Ct. App. 1987). These disparate approaches and results reflect the need for this Court to address and clarify the question presented by this petition.

The general confusion regarding whether state or federal law should be applied to this issue imperils the policy interest of having state courts provide a forum for suits under federal civil rights statutes. If public officials must either forego their right to be immune from trial

or rely upon this Court's certiorari jurisdiction to obtain review of state trial court decisions denying immunity prior to trial, they will be well-advised, if not compelled, to remove all civil rights actions to federal court in order to fully protect this federally recognized entitlement. This dilemma was recognized by the Supreme Judicial Court of Massachusetts when it held that public officials could immediately appeal a trial court decision denying their claims of immunity. Breault, 513 N.E.2d at 1280 n.6.

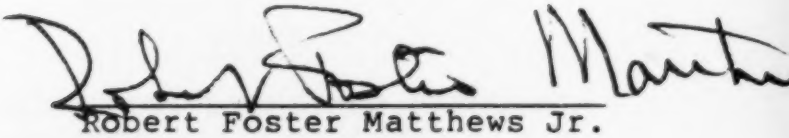
A decision from this Court resolving the question for which this writ is sought would preserve the vitality of state courts as forums for civil rights suits, preclude increased growth in the caseload of federal district courts and assure that individual defendants in such civil rights cases may be assured that their entitlement

to qualified immunity to be free from trial is not rendered meaningless.

CONCLUSION

For the reasons stated above, the Petitioners respectfully request that this Honorable Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,



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COURT OF APPEALS

NO. 88-CA-133-MR

DONALD C. SWAIN
EDWARD H. HAMMOND APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 86-CI-9074

KENNETH A. LINDSEY APPELLEE

* * * * * * * *

ORDER

BEFORE: MCDONALD, DYCHE AND REYNOLDS, JUDGES.

This Court having considered the appellee's motion to dismiss, the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby GRANTED, and the above-styled appeal is hereby DISMISSED as taken from a nonfinal and appealable order.

ENTERED: April 20, 1988

/s/Michael O. McDonald
JUDGE, COURT OF APPEALS

APPENDIX A

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 88-CA-133-MR

DONALD C. SWAIN
EDWARD H. HAMMOND APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 86-CI-9074

KENNETH A. LINDSEY APPELLEE

* * * * * * * * *

ORDER

BEFORE: MCDONALD, DYCHE AND REYNOLDS, JUDGES.

This Court having considered the appellants' motion to reconsider this Court's order, entered April 20, 1988, which dismissed the above-styled appeal, the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, DENIED.

ENTERED: August 1, 1988

/s/Michael O. McDonald
JUDGE, COURT OF APPEALS

APPENDIX B

[NO. 88-CA-133-MR]

REYNOLDS, JUDGE, CONCURS IN RESULT.
DYCHE, JUDGE, CONCURS SEPARATELY.

DYCHE, JUDGE, CONCURRING: I am compelled to concur because of precedent but I strongly feel some relief should be granted and my feelings are best expressed by the dissent in National Gypsum Co. v. Corns, Ky., 736 S.W.2d 325 (1987).

SUPREME COURT

88-SC-606-D
(88-CA-133)

DONALD C. SWAIN and
EDWARD H. HAMMOND MOVANTS

v. JEFFERSON CIRCUIT COURT
NO. 86-CI-9074

KENNETH A. LINDSEY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movants for a review of the decision of the Court of Appeals is denied.

ENTERED October 19, 1988.

/s/Robert F. Stephens
Chief Justice

APPENDIX C

COURT OF APPEALS OF KENTUCKY

NO. 88CA-000133

DONALD C. SWAIN and
EDWARD H. HAMMOND — APPELLANTS

VS. **MEMORANDUM OF AUTHORITIES IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL**

KENNETH A. LINDSEY — APPELLEE

* * * * *

This is a deprivation of civil liberties action commenced pursuant to 42 U.S.C. § 1983 et seq. Appellee, Kenneth A. Lindsey, commenced this action against Appellants, Dr. Donald C. Swain and Dr. Edward H. Hammond.

An initial Motion for Summary Judgment was made by Swain and Hammond [on grounds not related to this appeal]. The trial court overruled the Defendants' first Motion for Summary Judgment and no appeal was thereafter perfected.

APPENDIX D

Dr. Swain and Dr. Hammond thereafter filed a Second Motion for Summary Judgment arguing, in relevant part, that the doctrines of sovereign or qualified immunity entitled them to judgment as a matter of law. The Second Motion for Summary Judgment was also overruled and the within appeal followed.

Lindsey, by Counsel, respectfully submits that the Order overruling the Motion for Summary Judgment is, under Kentucky law, not final and appealable and therefore the within appeal should be dismissed.

ARGUMENT

The Order overruling Defendants' Second Motion for Summary Judgment is not final and appealable. Such an Order is interlocutory.

> An order overruling a motion for summary judgment is an interlocutory order. Since it is not a final order, it is not appealable. Battoe v. Beyer,

> Ky., 285 S.W.2d 172, 173 (1955) [citations omitted].

Accord, Bell v. Harmon, Ky., 284 S.W.2d 812, 814 (1955); Gumm v. Combs, Ky., 302 S.W.2d 616, 617 (1957).

Appellate jurisdiction is derived only from final orders and judgments. Webster County Soil Conversation Dist. v. Shelton, Ky., 437 S.W.2d 934, 936 (1969) [citations omitted].

Appellee's Counsel is aware of the case of Dominque v. Telb, 831 F.2d 673 (6th Cir. 1987) which indicates that an Order overruling a Motion for Summary Judgment on the grounds of qualified immunity is final and appealable. However, said case is inapplicable to the within action for several reasons. First of all, Dominque v. Telb was, of course, filed in federal court and, therefore, subject to federal procedural law. Conversely, the within action was filed in

state court and therefore subject to state procedural rules and law. Cases adjudicated in state courts and commenced by virtue of federal statutory rights are subject to state procedural rules. St. Louis Southwestern Railway Co. v. Dickerson, 470 U.S. 409, 411 (1985). The mechanism by which Swain and Hammond filed their Motion for Summary Judgment was, of course, K.R.C.P. 56. Such rules of court are procedural. Richey v. Richey, Ky., 389 S.W.2d 914, 919 (1965).

The rationale in Dominque v. Telb, supra, [for permitting an appeal from an order overruling a motion for summary judgment on qualified immunity grounds], is to permit an early resolution of the case so that defendants will not be burdened with discovery. In the case at bar, discovery is near complete. Hammond has been deposed. Swain has been deposed. Lindsey has been deposed. Lindsey's im-

mediate superior has been deposed as well. Therefore, Appellee respectfully submits that any rationale for applying Dominque v. Telb to the within case is nonexistent.

For the above mentioned reasons, it is respectfully submitted that the Order from which Appellants appeal is not final and appealable and therefore the within appeal should be dismissed.

Respectfully submitted,

/s/Gary R. Hillerich
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CERTIFCATE OF SERVICE

I hereby certify that copies of the foregoing were mailed on this the 2nd day of March, 1988, to:

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/s/Gary R. Hillerich
COUNSEL FOR APPELLEE

COURT OF APPEALS OF KENTUCKY

NO. 88CA-000133

DONALD C. SWAIN and
EDWARD H. HAMMOND — APPELLANTS

v.

MEMORANDUM IN SUPPORT OF RESPONSE TO MOTION TO DISMISS APPEAL

KENNETH A. LINDSEY — APPELLEE

* * * * *

The Appellants, Donald C. Swain ("Swain") and Edward H. Hammond ("Hammond"), were both, at all times relevant hereto, officials of a state agency of instrumentality, the University of Louisville. Federal substantive law entitled Swain and Hammond to qualified immunity freeing them from the cost, expense and hassle of federal "civil rights" litigation when their actions have not violated federal constitutional principles clearly established by the United States Supreme Court

or by other federal decisions. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Appellee's contention that this appeal should be dismissed ignores the substantive nature of qualified immunity and the entry by the court below of a final, appealable Order regarding its availability.

Qualified immunity is a substantive right possessed by government officials freeing them of the cost and disruption inflicted by civil rights litigation when their actions have complied with clearly established federal law. In Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), the Supreme Court advised: "[t]he entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a cause is erroneously permitted to go to trial." The decision of the court below overruling Swain and Hammond's claim of qualified immunity "finally and

conclusively determine[d] defendant[s]' claim of right not to stand trial." Id. Appellee's claim that a final determination of qualified immunity should not occur until after trial would render their right not to stand trial meaningless.

Appellee attempts to obscure the operation of federally created rights when they are asserted in a state court action. There is little question that cases asserting federal rights in state courts are subject to state procedural rules. However, it is equally clear that, in such actions, the governing substantive law is federal. St. Louis Southwestern Rwy. Co. v. Dickerson, 470 U.S. 409, 411 (1985). Swain and Hammond have asserted their substantive right created by federal law not to stand trial. An inseparable element of this right is the opportunity to immediately appeal the trial court's decision overruling their claim to qualified

immunity. See Mitchell, 472 U.S. at 526-527; Dominque v. Telb, 831 F.2d 673 (6th Cir. 1987). Appellee's discussion of the Dominque case attempts to obscure this well-established rule.

Appellee has also ignored the well-established definitions of a final, appealable Order. In Murty Bros. Sales, Inc. v. Preston, Ky., 716 S.W.2d 239, 241 (1986), the Supreme Court of Kentucky remarked that "our Court includes within the definition of a final, appealable order one which 'operates to divest some right in such a matter as to put it out of the power of the court making the order . . . to place the parties in their original condition.'" This is precisely the case here. Swain and Hammond have asserted their federal substantive right not to stand trial, and the court below overruled it. If that decision was incorrect, neither this Court nor the court below can restore

this right if Swain and Hammond are subjected to trial. Accordingly, the court below's Order overruling Swain and Hammond's claim of qualified immunity is a final, appealable Order properly before this Court.

Finally, an appealable Order under CR 54.02 must be designated as final and include a determination that "no just reason for delay" exists for its appeal. See Stillpass v. Kenton County Airport Board, Inc., Ky., 403 S.W.2d 46 (1966). The court below did so in the Order which Appellants' seek to have reviewed by this Court:

> "It also appearing to the court that this is one of those cases where a Summary Judgment can be a Final Order for purposes of appeal and that there is no just reason for delay, this is a Final Order pursuant to CR 54.01 and 54.02."

Accordingly, the applicable procedural rules have been complied with and this

appeal requiring determination of Swain and Hammond's federal substantive rights is properly before this Court.

Respectfully submitted,

/s/Robert F. Matthews
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BARBARA REID HARTUNG

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/s/Thomas H. Lyons
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CERTIFCATE OF SERVICE

A copy of the foregoing Response to Motion to Dismiss Appeal and Memorandum in Support of Response to Motion to Dismiss Appeal was mailed, postage pre-paid, to Frank E. Haddad, Jr., Esq. and Gary R. Hillerich, Esq., 529 Kentucky Home Life Building, Louisville, Kentucky 40202, Counsel for Appellee, this 14 day of March, 1988.

/s/Robert F. Matthews
ROBERT F. MATTHEWS
COUNSEL FOR APPELLANTS

SUPREME COURT OF KENTUCKY
NO. 88-SC-000606-D

DONALD C. SWAIN and
EDWARD H. HAMMOND — MOVANTS

MOTION FOR DISCRETIONARY REVIEW

v. AND

RECORD ON MOTION

KENNETH A. LINDSEY — RESPONDENT

* * * * * *

COURT OF APPEALS
NO. 88-CA-133-MR

JEFFE[illegible]N CIRCUIT COURT
ACTI[illegible] NO. 86-CI-9074

* * * * * *

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APPENDIX F

SUPREME COURT OF KENTUCKY

NO. 88-SC-000606-D

DONALD C. SWAIN and
EDWARD H. HAMMOND — MOVANTS

v. MOTION FOR DISCRETIONARY REVIEW

KENNETH A. LINDSEY — RESPONDENT

* * * * * *

Pursuant to and in compliance with CR 76.20, Movants, Donald C. Swain and Edward H. Hammond, by counsel, hereby move this Court to grant Discretionary Review in this case and state as follows:

(a) THE NAMES OF MOVANTS AND RESPONDENT AND THE NAMES AND ADDRESSES OF THEIR COUNSEL.

The Movants are Donald C. Swain and Edward H. Hammond, and their counsel are identified immediately below.

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The Respondent is Kenneth A. Lindsey, and his counsel is identified immediately below.

Frank E. Haddad, Jr.
Gary R. Hillerich
529 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 583-4881

(b) THE DATE OF THE FINAL DISPOSITION BY THE COURT OF APPEALS.

On April 20, 1988, the Court of Appeals rendered the order that is the subject of this Motion for Discretionary Review, and the Court of Appeals denied Movants' Motion for Reconsideration on August 1, 1988.

(c) BOND.

No supersedeas bond has been executed in this case.

(d) STATEMENT OF THE CASE.

(i) The Material Facts.

In the underlying litigation from which Movants' appeal was taken, Respondent relied upon causes of action provided by federal civil rights statutes, 42 U.S.C. §§ 1983 and 1985, and filed this suit in Jefferson Circuit Court. Respondent claims that Movants violated his due process and equal protection rights guaranteed him as a matter of federal law. It is undisputed that Movants, at all relevant times, were employed by a state agency, the University of Louisville, and, that all acts complained of by Respondent were undertaken by Movants within the scope of their employment. Respondent seeks to recover, to the extent permitted by

applicable federal law, general and punitive damages and attorneys' fees.

In their Answer, Movants pled the federally recognized affirmative defenses of sovereign and qualified immunity. As a matter of federal law, if entitled to either sovereign or qualified immunity, Movants are immune both from being sued and from having to stand trial. In order to preserve their immunity from trial, Movants sought summary judgment on the legal issues of sovereign and qualified immunity. The Jefferson Circuit Court overruled this motion but certified its order as a final order for purposes of appeal.

Movants timely appealed this order and Respondent thereafter motioned to dismiss the appeal on the basis that the order was non-final and nonappealable. The Court of Appeals granted this motion and ordered Movants' appeal dismissed

on April 20, 1988. Movants motioned for reconsideration, but the Court of Appeals denied this motion in an order issued August 1, 1988.

(ii) The Question Of Law Involved.

Whether a trial court order denying sovereign and/or qualified immunity to public officials, who have been sued under federal civil rights statutes for actions taken in the course of their employment, and which order is appealable as a matter of right under federal law, will be recognized as an appealable order by Kentucky courts.

(iii) The Order Of The Court of Appeals Should Be Reviewed Both Because It Wrongly Prejudices Substantial Rights Granted Movants By Federal Law And Because It Involves A Significant Question Concerning Procedures Applicable To Litigating Suits Under Federal Civil Rights Statutes In Kentucky Courts.

The Order of the Court of Appeals dismissing Movants' appeal should be reviewed for the following reasons.

FIRST, the Court of Appeals erred, because federal law grants Movants substantive and substantial rights to appeal the trial court's order denying them sovereign and/or qualified immunity prior to trial. To the extent that Kentucky procedural law is inconsistent with Movants' substantial rights under federal law, Kentucky law must yield. See Felder v. Casey, 108 S. Ct. 2302 (1988).

As public officials, Movants are entitled to qualified immunity in a suit brought under federal civil rights statutes when their actions did not violate the Plaintiff's clearly established constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Qualified immunity "is an immunity from suit rather than a mere defense to liability; and like

an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original). Qualified immunity is, in short, a substantial and substantive right of Movants to be immune from suit and from standing trial. The United States Supreme Court has held that Movants' substantive rights can only be adequately preserved by permitting appeal prior to trial of orders denying qualified immunity, because, otherwise, the immunity could be erroneously and irrevocably lost. Mitchell, 472 U.S. at 526.

When suit is brought under federal civil rights statutes in state court, state procedural rules must yield to Movants' substantial rights under controlling federal law. See Felder, 108 S. Ct. at 2314. "[T]he Supremacy Clause imposes on state courts a constitutional duty

'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'" Felder, 108 S. Ct. at 2313, quoting Garrett v. Moore-McCormack, 317 U.S. 239, 245 (1942).

The Felder case holds that rights granted individuals by federal law shall not be infringed by state procedural rules. Here, Movants have individual rights under federal law -- rights wholly unrelated to the University of Louisville -- to qualified immunity from being sued and from standing trial. Moreover, federal law demands that Movants' rights be protected from erroneous deprivation by appellate review of the trial court's order prior to trial. The Felder case, therefore, requires that Movants' individual rights under federal law prevail over conflicting Kentucky procedural rules. Accordingly,

the Court of Appeals erred in dismissing Movants' appeal.

SECOND, the Court of Appeals' order is inconsistent with the "collateral order" doctrine adopted in Abraham v. Commonwealth, Ky. App., 565 S.W.2d 152 (1977). The collateral order doctrine recognizes that some trial court rulings affect substantial rights of a party and are effectively unreviewable on appeal after trial. See Mitchell, 472 U.S. at 526-27. See also Stack v. Boyle, 342 U.S. 1, 12 (1951) (Jackson, J., concurring). In Abraham, the Court of Appeals followed the Stack case and recognized that if a defendant could not appeal an order denying his motion to reduce bail and was forced to wait until after trial, the order was effectively unreviewable. Abraham, 565 S.W.2d at 155.

This case presents exactly the same type of situation presented in Abraham.

In Abraham, if the trial court erred in denying bail reduction, appellate review after trial was pointless: the benefits and rights derived from having bail reduced were long since lost forever. Here, if the trial court erred in denying sovereign or qualified immunity, appellate review after trial is likewise pointless: Movants' immunity and right not to stand trial cannot be restored by this or any other court. Clearly, the order denying Movants immunity is a final adjudication of the parties' rights on an issue collateral to the facts to be determined at trial. Even if Respondent should prove all of the facts alleged in his Complaint, Movants may still be entitled to qualified immunity, because they did not violate his clearly established constitutional rights. The potential for waste of time, expense and judicial resources is obvious.

THIRD, the question presented by this Motion has not been decided in Kentucky. In the brief interim since the Mitchell decision, the highest courts of only three states have ruled on the issue presented by this Motion, and all have held that a trial court's order denying qualified immunity is appealable prior to trial. Breault v. Chairman of Bd. of Fire Commr's, 513 N.E.2d 1277 (Mass. 1987), cert. denied, 108 S. Ct. 1078 (1988); Robinson v. Beaumont, 725 S.W.2d 839 (Ark. 1987); Anderson v. City of Hopkins, 393 N.W.2d 363 (Minn. 1986). This Court is now presented with an opportunity to follow the well-reasoned decisions of these courts.

FOURTH, the Court of Appeals' order severely impairs the interests of all parties in litigating suits brought under federal civil rights statutes in Kentucky state courts. Defendants in suits under federal civil rights statutes will be

compelled to remove all such suits from state to federal court to ensure that appellate review of their claim to sovereign or qualified immunity is available prior to trial. This will deprive citizens of the Commonwealth of their choice of bringing suits under federal civil rights statutes in state court. This result truly deprives both plaintiffs and defendants of meaningful access to the courts of this Commonwealth.

(e) A COPY OF THE ORDER SOUGHT TO BE REVIEWED.

Copies of the April 20, 1988 and August 1, 1988 orders of the Court of Appeals which Movants request this Court to review are attached hereto as part of the Record on Motion.

(f) PETITION FOR REHEARING OR MOTION FOR RECONSIDERATION.

Neither Movants nor Respondent have a Petition for Rehearing or Motion for

Reconsideration pending in the Court of Appeals. The Court of Appeals, as previously indicated, denied Movants' Motion for Reconsideration on August 1, 1988.

CONCLUSION

This Motion for Discretionary Review should be granted. The Court of Appeals' order ignores Movants' substantial rights under controlling federal law and severely impairs the rights and interests of present and future litigants of federal civil rights suits in Kentucky courts.

Respectfully submitted,

/s/Robert F. Matthews
Robert F. Matthews
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/s/Thomas H. Lyons
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COUNSEL FOR MOVANTS

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing Motion for Discretionary Review and Record on Motion were mailed, postage prepaid, to John C. Scott, Clerk of the Court of Appeals of Kentucky, 403 Wapping Street, Bush Bldg., Frankfort, Kentucky 40601; and to counsel for Respondent, Kenneth A. Lindsey, Frank E. Haddad, Jr., and Gary R. Hillerich, 529 Kentucky Home Life Bldg., Louisville, Kentucky 40202, this 18 day of August, 1988.

/s/Robert F. Matthews
COUNSEL FOR MOVANTS

SUPREME COURT OF KENTUCKY

NO. 88-SC-000606-D

DONALD C. SWAIN and
EDWARD H. HAMMOND — MOVANTS

v. RECORD ON MOTION

KENNETH A. LINDSEY — RESPONDENT

Order of Court of Appeals
April 20, 1988 — Tab No. 1

Order Denying Motion for Reconsideration
August 1, 1988 — Tab No. 2

Order of Jefferson Circuit Court
January 4, 1988 — Tab No. 3

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 88-CA-133-MR

DONALD C. SWAIN
EDWARD H. HAMMOND APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 86-CI-9074

KENNETH A. LINDSEY APPELLEE

* * * * * * * *

ORDER

BEFORE: MCDONALD, DYCHE AND REYNOLDS, JUDGES.

This Court having considered the appellee's motion to dismiss, the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby GRANTED, and the above-styled appeal is hereby DISMISSED as taken from a nonfinal and appealable order.

ENTERED: April 20, 1988

/s/Michael O. McDonald
JUDGE, COURT OF APPEALS

Tab No. 1

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 88-CA-133-MR

DONALD C. SWAIN
EDWARD H. HAMMOND APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 86-CI-9074

KENNETH A. LINDSEY APPELLEE

* * * * * * * *

ORDER

BEFORE: MCDONALD, DYCHE AND REYNOLDS, JUDGES.

This Court having considered the appellants' motion to reconsider this Court's order, entered April 20, 1988, which dismissed the above-styled appeal, the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, DENIED.

ENTERED: August 1, 1988

/s/Michael O. McDonald
JUDGE, COURT OF APPEALS

Tab No. 2

[NO. 88-CA-133-MR]

REYNOLDS, JUDGE, CONCURS IN RESULT.
DYCHE, JUDGE, CONCURS SEPARATELY.

DYCHE, JUDGE, CONCURRING: I am compelled to concur because of precedent but I strongly feel some relief should be granted and my feelings are best expressed by the dissent in National Gypsum Co. v. Corns, Ky., 736 S.W.2d 325 (1987).

NO. 86CI 09074 JEFFERSON CIRCUIT COURT

TWELFTH DIVISION

KENNETH A. LINDSEY PLAINTIFF

VS. ORDER

DONALD C. SWAIN, et al. DEFENDANT

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This case came before the Court on defendant's second Motion for Summary Judgment and the Court having considered the arguments and briefs filed by the parties and being further advised,

IT IS ORDERED that the defendant's second Motion for Summary Judgment be and the same is hereby overruled.

It also appearing to the Court that this is one of those cases where a Summary Judgment can be a Final Order for purposes of appeal and that there is no just reason

for delay, this is a Final Order pursuant to CR 54.01 and 54.02.

/s/Edwin A Schroering, Jr., Judge
EDWIN A. SCHOROERING, JR., JUDGE

DATE: JAN 04 1988

Copy To:
Frank E. Haddad, Jr.
Gary R. Hillerich
Barbara Reid Hartung
Thomas H. Lyons